FILED
JUL 25 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-146

BILL R. HUNTER, d/b/a THE COURIER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
RALPH N. ALBRIGHT, JR.
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement	4
Reasons for Granting the Writ	6
Conclusion	14
Appendix A: Opinion of the Court of Appeals	1a
Appendix B: Opinion of the District Court	26a
Appendix C: Judgment of the District Court	39a
Appendix D: Department of Housing and Urban Development Advertising Guidelines for Fair Housing, effective May 1, 1972, 37 F.R. 6700 (April 1, 1972), — C.F.R. —	41a

AUTHORITIES

Cases:

Amalgamated Furniture Factories, Inc. v. *Rochester Times Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927)	11
Chicago Joint Board v. *Chicago Tribune Co.*, 307 F. Supp. 422 (N.D. Ill. 1969), aff'd., 435 F.2d 470 (7th Cir. 1970) *cert. denied*, — U.S. — (1971)	10
Cramp v. *Board of Public Instruction*, 368 U.S. 272 (1961)	13
Goldsmith v. *Jewish Press Pub. Co.*, 118 Misc. 789, 195 N.Y.S. 37 (1922)	11

Page

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) . 10
Head v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963) 10
Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951) 9
Morey v. *Doud*, 354 U.S. 458 (1967) 13
Richards v. *United States*, 369 U.S. 1, 11 (1962) 7

STATUTES:

15 U.S.C. § 52 11
15 U.S.C. § 53(b) 11
15 U.S.C. § 54(b) 11
28 U.S.C. § 1254(1) 2
42 U.S.C. § 3603(b) ..... passim
42 U.S.C. § 3604(c) ..... passim
86 Stat. 3, — U.S.C. — (P.L. 92-225) 11

REGULATIONS AND OTHER AUTHORITIES:

37 F.R. 6700 (April 1, 1972) — C.F.R. — 6, 10, 13, 41a
37 F.R. 6156 (March 24, 1972) 11
114 Cong. Rec. S. 983 (Daily Ed., Feb. 6, 1968) 8

Supreme Court of the United States

OCTOBER TERM, 1972

No.

BILL R. HUNTER, d/b/a THE COURIER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Bill R. Hunter, who is engaged in the newspaper publishing business, doing business as *The Courier,* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on April 27, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 459 F.2d 205, and appears at Appendix A (p. 1a, *infra*). The opinion of the United States District Court for the District of Maryland (Judge Roszel C. Thompsen) is reported at 324 F.Supp. 529, and appears at Appendix B (p. 26a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether the advertising proscriptions of Section 804(c) of the Civil Rights Act of 1968 (Title VIII Fair Housing) apply to newspapers in publishing real estate advertisements, where Title VIII by its terms applies only to real estate sellers, lessors, brokers, and lending institutions.

II.

Whether, assuming applicability to newspapers, Section 804(c) of the Act is void for vagueness and violative of the First and Fifth Amendments, in that, being totally unfamiliar with the advertised dwelling, newspapers are forced to make instantaneous judgments of whether certain advertising language or display "indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an *intention* to make such preference, limitation, or discrimination".

III

Whether Congress may, consistent with due process and freedom of speech and the press, on the one hand allow certain persons to discriminate in real estate transactions, yet on the other hand seal their lips and prevent them from indicating an intention to so act. If Congress may not so legislate, may it subject newspapers to possible civil contempt if newspapers publish advertisements from such persons.

IV.

Whether the First Amendment protects speech in a commercial context.

V.

Whether application of Section 804(c) of the Act to newspapers violates petitioner's First Amendment right to operate his press free of governmental control and interference.

VI.

Whether the advertisements involved herein indicate, on their face, any preference, limitation, or discrimination in violation of Section 804(c) of the Act.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. Amend. I.

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. V.

Statutes:

Section 804(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c):

> "(c) [It shall be unlawful] to make, print, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination."

Section 803(b)(2) of the Civil Rights Act of 1968, 42 U.S.C. § 3603(b)(2):

> "(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to . . . (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."

Regulations:

Department of Housing and Urban Development Advertising Guidelines for Fair Housing, effective May 1, 1972, 37 F.R. 6700 (April 1, 1972), which appear at Appendix D (p. 41a, *infra*).

STATEMENT

Petitioner is the editor and publisher of *The Courier*, a weekly newspaper with a circulation of approximately 29,000 copies distributed in and around Prince George's County, Maryland. Like most newspapers, *The Courier* carries, and is primarily supported by, advertisements, including classified advertisements of dwellings for sale or rent. The paper, in January and June, 1970, carried two classified advertisements for a furnished apartment in what was described as a "white home".[1] The person who placed the contested advertisements was not made a party to the litigation. He was an elderly man who resided in Southeast Washing-

---

[1] The January 8, 1970 advertisement read:

> "FOR RENT—Furnished basement apartment. In Private white home. Call JO 3-5493."

The June 18, 1970 advertisement read:

> "FURNISHED APARTMENT, well located, clean, quiet. In white home. Gentlemen only. $17.50 a week. Call JO 3-5493."

ton, D.C. and who, under 42 U.S.C. § 3603(b)(2), enjoyed the "Mrs. Murphy" exemption.

Based on these two advertisements, the Attorney General under 42 U.S.C. § 3613, brought the first action in this country against a newspaper under the 1968 Act. In the civil action against the petitioner filed in the United States District Court for the District of Maryland, the Attorney General sought an order enjoining petitioner from "(a) printing, or publishing any notice or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin; and (b) failing or refusing to take adequate affirmative steps to correct the effects of defendant's past discriminatory practices."

After an abbreviated trial,[2] the District Court refused to issue an injunction, holding that the Attorney General failed to show a pattern or practice by the petitioner of resistance to the rights granted by Title VIII. However, the District Court granted judgment declaring that Section 804(c) applied to newspapers in publishing real estate advertisements; that such application did not offend either the First or Fifth Amendments; and that the involved advertisements were on their face discriminatory within the meaning of Section 804(c). Judgment to this effect was entered by the District Court on May 14, 1972. On June 7, 1971 petitioner noted his appeal from only those portions of the District Court's judgment declaring the validity of the application of Section 804(c) to newspapers. On

[2] Except for petitioner's testimony on his newspaper's policy in this area and facts surrounding his newspaper's receipt of the questioned advertisement, all essential facts were stipulated to by the parties through counsel.

April 27, 1972, the Court of Appeals affirmed the District Court's declaration that newspapers were constitutionally covered by the advertising proscriptions of Section 804(c) and that the advertisements were violative of that Section.

After the Court of Appeals decision herein, the Department of Housing and Urban Development, on May 1, 1972, made effective its Advertising Guidelines for Fair Housing, 37 F.R. 6700 (April 1, 1972)—C.F.R.—(App. A. p. 41a, *infra*). By these guidelines, HUD attempts to outline the many nuances and subtleties to be avoided in real estate advertising. By virtue of the lower courts' interpretation of Section 804(c), these guidelines apply to newspapers and it is newspapers which are thereby effectively made the enforcement arm of the government in the government's efforts to eliminate racially suggestive language from real estate advertising.

REASONS FOR GRANTING THE WRIT

This is a case of first impression in this Court. Indeed, it is the first case ever brought under Title VIII of the Civil Rights Act of 1968 against a newspaper for printing what the Justice Department believes to be a racially discriminatory real estate advertisement.

The decisions of the District Court and Court of Appeals in this case stand for the proposition that a newspaper, which has absolutely no connection with, or knowledge of, the advertised property, publishes a real estate advertisement at its peril under Title VIII. If the advertisement is later found to be in conflict with the vague outlines of Section 804(c), 42 U.S.C. § 3604 (c) or the HUD advertising guidelines, 37 F.R. 6700 (April 1, 1972), the newspaper is exposed to a possible

lawsuit for injunctive relief with all the concomitant major expenses and difficulties associated with litigation. This exposure of newspapers exists notwithstanding the right of the involved property owner to restrict his premises to only those persons with whom he chooses to do business. This exposure exists notwithstanding the absence of action taken against the property owner. And, this exposure exists notwithstanding the patent unfairness of converting a newspaper into the enforcement section of the Civil Rights Division of the Justice Department by requiring a newspaper to make an almost instantaneous judgment on each submitted real estate advertisement based on the vague criteria set forth in the statute and HUD guidelines.

It is respectfully submitted that Congress did not intend such a drastic interpretation of the advertising proscription of Section 804(c). To hold that Section 804(c) applies to newspapers would violate fundamental principles of fairness and would offend the First Amendment.

A. SECTION 804(C), 42 U.S.C. § 3604(C) DOES NOT APPLY TO NEWSPAPERS.

In the District Court and in the Court of Appeals, petitioner urged that Section 804(c) should be read in context with the other provisions of Title VIII of the Civil Rights Act of 1968, which clearly demonstrate that Congress intended coverage of only owners, brokers, and lending institutions. As this Court stated in *Richards* v. *United States,* 369 U.S. 1, 11 (1962):

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a

sentence, but [should] look to the provisions of the whole law and to its object and policy.' " (Explanation is original).

Yet, both courts below took an isolated view of Section 804(c), and held that it reaches to "anyone" who publishes a real estate advertisement. In so holding, the courts failed to recognize that by its terms, Title VIII covers only dwelling owners, brokers, and lending institutions. Moreover, the sponsors of the legislation, in discussing the parameters of Title VIII coverage, specified that only brokers, property owners, managers, and others who "participate" in the sale, rental, or financing of housing were regulated by the Act. 114 Cong. Rec. S. 983 (Daily Ed., Feb. 6, 1968).

B. IF SECTION 804(C) APPLIES TO NEWSPAPERS, SUCH APPLICATION VIOLATES THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Freedom of the Press

In rejecting petitioner's arguments that the First Amendment bars application of section 804(c) to newspapers, the District Court and the Court of Appeals demonstrated a callous insensitivity to the practical problems of the day-to-day operation of the press. In holding Section 804(c) constitutional in the face of petitioner's free press arguments, the courts rested their respective decisions on three basic points: (1) that the involved advertisements are unprotected commercial speech; (2) that enjoining a newspaper from printing such unprotected speech works no unconstitutional free press infringement on a newspaper; and (3) that a newspaper can easily distinguish between permissible and impermissible real estate advertising under section 804(c).

Viewing this controversy within the context of the commercial—non-commercial speech dichotomy does not place this case in its proper First Amendment perspective. What petitioner attacked in the courts below was Congress' action in placing the burden of instantaneous real estate advertising judgments on the newspaper. Under the courts' interpretation of Section 804(c), the newspaper publishes submitted advertising at its peril. It is forced to make judgments about an advertiser's *intention* on pain of suffering protracted litigation with the Justice Department. If its judgment is in error, even good faith error, the court has the power to enjoin it from violating Section 804(c). As the Court of Appeals suggested in its decision, (Appendix A, p. 23a, *infra*) this injunctive power may freely issue against the press.

It is one thing to recognize that newspapers are, like other businesses, subject to reasonable, non-discriminatory laws, and quite another to use that recognition as a basis for permitting and, indeed, encouraging injunctions against newspapers for carrying what has been denominated, on an after-the-fact basis, discriminatory real estate advertising. After all, an injunction runs to an entire edition. If an edtion of an enjoined publisher is tainted by a discriminatory advertisement, regardless of how the advertisement came to be published, the newspaper publisher is exposed to the impossible dilemma of allowing the edition to be distributed and exposing himself to contempt, or withdrawing the edition and suffering the economic consequences.

This is an entirely different situation from the one involved in *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951), where a newspaper was enjoined from accepting or rejecting advertising in violation of the

anti-trust laws. Likewise, this case is different from the injunction in *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963), where a newspaper and radio station were enjoined by a state court from accepting advertisements from optometrists containing prices in violation of state law.[3] In both *Lorain* and *Head,* the newspaper's conduct in complying with the injunction was quite simple: in *Lorain,* the newspaper was required to eliminate its policy of refusing advertisements from those persons who advertised on a local radio station; and in *Head,* the newspaper was enjoined from accepting advertising containing prices of eyeglasses. In both cases, compliance on the part of the newspaper did not involve the exercise of judgment as to whether a subject advertisement came within the terms of the injunction or the law. In the instant case, however, the newspaper at its peril, is forced to glean an advertiser's discriminatory *intent* with only the vague HUD guidelines to assist him. It is the newspaper which is to decide whether the advertisement contains improper "catchwords", symbols implying or suggesting race, colloquialisms suggesting race, or directions to location of property, to choose only a few possible examples. See HUD Guidelines, Appendix D (p. 41a, *infra.*)

Placing the newspaper in this position as the Justice Department's enforcement arm creates a subtle and impermissible inroad on a "free and untrammeled" press, *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936), and also significantly departs from the "history of disassociation" that exists between the government and the press. *Chicago Joint Board* v. *Chicago Tribune*

[3] No First Amendment question was properly presented by appellants in *Head,* and this Court, therefore, refused consideration of the free press arguments. 374 U.S. at 432, n.12.

Co., 307 F.Supp. 422 (N.D. Ill. 1969), aff'd., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, — U.S. — (1971). It is as difficult and impossible for a publisher to make value judgments on whether an advertisement is discriminatory or manifests an advertiser's discriminatory intent, as it is for a publisher to judge whether a product advertiser's representations are true or not misleading. Yet, either by statute or judicial decision, newspapers are relieved of responsibility for what is now commonly referred to as false advertising. See, e.g., *Goldsmith* v. *Jewish Press Pub. Co.*, 118 Misc. 789, 195 N.Y.S. 37 (1922); *Amalgamated Furniture Factories, Inc.* v. *Rochester Times Union, Inc.*, 128 Misc. 673, 219 N.Y.S. 705 (1927); Federal Trade Commission Act, 15 U.S.C. §§ 52, 53(b), 54(b). These decisions and statutory exemptions all rest on the unstated premise that it would be unreasonably burdensome to require newspapers, on pain of penalty, to sift from their editions those advertisements which a publisher might conceivably think were misleading. Similarly, forcing newspapers to decide, on pain of protracted litigation and possible civil contempt, what advertisements under the Fair Housing provisions of the 1968 Civil Rights Act manifest an advertiser's discriminatory intent is plainly oppressive.

In the field of much social legislation, the unwitting conversion of the private press into quasi-enforcement agencies of the government has apparently gained wide acceptance among many state and congressional legislators. In short, it is in vogue and represents an easy and quick way for the government to enforce such legislation. *See, e.g.*, newspaper responsibility for accepting certain federal campaign advertising, Federal Election Campaign Act of 1971, 86 Stat. 3, — U.S.C. § —, and regulations promulgated thereunder, 37 F.R. 6156, 6157-58 (March 24, 1972), 11 C.F.R. —. Petitioner

urges that this Court must announce whether such legislation is constitutionally valid, and, if so, what are the limits of such legislative power. This case presents the vehicle for such a therapeutic pronouncement.

2. Due Process

Under Section 803(b)(2), 42 U.S.C. § 3603(b)(2), Congress has set forth the national policy that one who owns what is now widely known as a "Mrs. Murphy" dwelling may for any reason refuse to rent to anyone. It does not matter that such refusal rests on racial, religious, or ethnic grounds. According to Section 803(b)(2), that owner may not advertise his intention to exercise that right. In short, Congress has stated that certain individuals may discriminate in the sale or rental of dwellings, but they may not announce their intention to so discriminate.

Resting its reasoning on Congress' power to prohibit such mere commercial advertising because that advertising may reasonably be thought to have a harmful effect on the general aims of the Act, the Court of Appeals held that the advertising prohibitions comported with due process. But there is no rational basis, we submit, to forbid a homeowner from communicating his intention to exercise his section 803(b) right to discriminate. In fact, the mere grant of the "Mrs. Murphy" exemption defeats the "general aims" of the Act. Yet Congress saw fit to allow that exemption.

Furthermore, not only is "Mrs. Murphy" exempted from the Act, but by the very terms of Section 803(b)(1)(B), 42 U.S.C. § 3603(b)(1)(B), an advertiser may place a discriminatory advertisement and allow it to run until he receives "notice". No where is this "notice" provision defined or explained. What notice?

By whom? For what purpose? When? Petitioner raised these questions in both Courts, but they went unanswered. It would appear that an advertiser is not subject to a Justice Department civil action for discriminatory advertising until he receives this unspecified and undefined "notice". However, according to the courts below, a newspaper is exposed at anytime to an Attorney General action. This unjustifiable discrimination against newspapers is a patent violation of due process. *See e.g., Morey* v. *Doud,* 354 U.S. 458 (1967).

Finally, a rapid scanning of the generalized and vague proscriptions found in Section 804(c) of the Act can lead only to the conclusion that men of common intelligence would be required to guess at its meaning and to differ as to its proper application. As such, this Section denies to petitioner basic due process of law. *Cramp* v. *Board of Public Construction,* 368 U.S. 272 (1961). The HUD Advertising Guidelines (Appendix D, p. 41a, *infra*) which, if anything, are more vague and indefinite than Section 804(c), do nothing to obviate this constitutional infirmity and point up the impossibility of assigning ascertainable standards to the general and vague statutory language.

C. THE ADVERTISEMENTS DO NOT ON THEIR FACE VIOLATE SECTION 804(C).

The Court below found that the contested advertisements indicated a preference for a white tenant and were intended by the advertiser to do so. Whether the advertisement indicates a preference or an intention to make a preference must be determined from the four corners of the advertisement, not from an after-the-fact subjective examination of the advertiser's motives.

Using this test, it is submitted that the advertisements in question are not discriminatory on their face.

They do not indicate that the owner prefers whites or that the owner intends to discriminate against blacks. Instead, the advertisements state the fact that the property advertised is occupied by whites. The reference to race in the advertisements is a statement of fact and cannot reasonably be characterized as a discriminatory statement. It is not unreasonable to assume that prospective tenants desire to know the race of the occupants in a private home in which the owners lease one or two rooms. Such a landlord-tenant relationship in a small, private boarding house is significantly different from that relationship in a large, metropolitan high-rise apartment. The relationship is obviously one of closeness and intimacy. Indeed, the "Mrs. Murphy" exemption was provided in recognition of this close relationship.

In circumstances such as these, statements of mere fact regarding the race of the owners of the boarding house is neither unreasonable nor an indication of any preference in violation of Section 804(c). Accordingly, publication of the advertisement by the newspaper does not offend that section and the lower courts erred as a matter of law on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
RALPH N. ALBRIGHT, JR.
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1643

UNITED STATES OF AMERICA, *Appellee,*

versus

BILL R. HUNTER, d/b/a The Courier, *Appellant.*

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued November 29, 1971 Decided April 27, 1972)

Before SOBELOFF, Senior Circuit Judge, and CRAVEN and FIELD, Circuit Judges.

Arthur B. Hanson (W. Frank Stickle, Jr., Ralph N. Albright, Jr., on brief) for Appellant, and Frank E. Schwelb, Attorney, Department of Justice, (David L. Norman, Assistant Attorney General, Walter W. Barnett, Robert J. Wiggers, Attorneys, Department of Justice, and George Beall, United States Attorney, on brief) for Appellee.

SOBELOFF, Senior Circuit Judge:

This case presents the first occasion for a federal court of appeals to consider certain important issues in the application and enforcement of Title VIII (Fair Housing) of the Civil Rights Act of 1968.

Appellant Bill R. Hunter is editor and publisher of *The Courier,* a weekly newspaper with a circulation of 29,000, chiefly in Prince George's County, Maryland. *The Courier* carries classified advertisements prepared by persons offering dwellings for sale or rent. In January and again in June, 1970, *The Courier* published a classified advertise-

ment tendering for rent a furnished apartment in what was denominated a "white home."[1]

Contending that such advertisements violated § 804(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c),[2] the Attorney General instituted the present action against Hunter to obtain an order enjoining *The Courier's* further publication of advertisements violative of § 3604(c). The Attorney General also prayed for "such additional relief as the interests of justice may require."

Defending against the suit, Hunter disputed the Attorney General's interpretation of § 3604(c). The publisher argued that the section was not intended to apply to a newspaper which published such advertisements; that it would be unconstitutional if so applied; and that, in any event, the statute was not violated by an advertisement specifying that the apartment was located in a "white home."

After a trial, the District Judge denied the Government's request for an injunction, but did grant it a favor-

---

[1] The classified advertisement on January 8, 1970 read:

> FOR RENT—Furnished basement apartment. In private white home. Call JO 3-5493.

The ad on June 18, 1970 read:

> FURNISHED APARTMENT, well located, clean quiet. In white home. Gentlemen only. $17.50 a week. Call JO 3-5493.

Both ads were placed by an elderly, retired man who lived in southeast Washington, D. C.

[2] § 3604 Discrimination in the sale or rental of housing

> (c) [It shall be unlawful] to make, print, or publish, or cause to be made, printed or published, any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion or national origin, or an intention to make any such preference, limitation, or discrimination.

able judgment declaring that § 3604(c) was intended to apply to newspapers; was constitutional in its ban on discriminatory advertisements, including those published by newspapers; and was contravened by the advertisements published in *The Courier*. From these adverse rulings Hunter appeals.

I

Appellant raises essentially the same arguments he unsuccessfully presented to the District Court. Perceiving no more merit in appellant's contentions than did the judge below, we affirm the District Court's declaratory judgment.

A. *Section 3604(c) Prohibits the Publication of Discriminatory Housing Advertisements by Newspapers*

Hunter first takes the position that § 3604(c) was not intended to prevent newspapers from publishing classified advertisements indicating a racial or other statutorily proscribed preference in the sale or rental of a dwelling. We reject this assertion, for we find Congress clearly intended that very prohibition.

Legislative intent is first to be gathered from the plain meaning of the words of the statute. It is presumed that statutory language is used in its ordinary sense, with the meaning commonly attributed to it, unless the contrary clearly appears. *Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917). The section here under examination provides on its face no exemptions in favor of newspapers. Rather, it uses precisely the language which would lead the ordinary reader to conclude that newspapers are to be brought within its purview. The section provides it shall be unlawful "to make, print, publish, or cause to be made, printed, or published" any advertisement prohibited by the Act. In the context of classified real estate advertising, landlords and brokers "cause" advertisements to be

printed or published and generally newspapers "print" and "publish" them. Since each phrase in a statute must, if possible, be given effect, *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955), both landlords and newspapers are within the section's reach.

Hunter attempts to draw an analogy to *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 1970) (appeal pending, No. 26,666, 9th Cir.), in which it was held that § 704(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, does not include newspapers in its proscription of discriminatory employment advertisements. *Brush*, however, is inapposite, because the section there involved is fundamentally different from our § 3604(c) in that the 1964 Act specifically lists the persons regulated: "an employer, labor organization, or employment agency." The *Brush* court held that a newspaper was none of these and that, under the maxim *expresso unius est exclusio alterius*, it did not fall within the Act's restriction. Moreover, *Brush* relied on a clear statement in the legislative history of the 1964 Act that newspapers were not required to exercise any control or supervision over the advertisements they published. In contrast to the section construed in *Brush*, no restriction in scope appears on the face of § 3604(c). Unlike other sections of the Fair Housing title,[3] § 3604(c) does not provide any specific exemptions or designate the persons covered, but rather, as the court below noted, applies on its face to "anyone" printing or publishing illegal advertisements. *Brush* is, therefore, not persuasive in interpreting the instant section.

Congressional intent disclosed by the meager legislative history concerning § 3604(c) does not contradict our view of the unambiguous language chosen by the draftsmen of

---

[3] E.g., §§ 803(b), 805 and 807 (42 U.S.C. §§ 3603(b) 3605 and 3607).

the section.[4] Indeed there is some evidence that the publication of discriminatory classified advertisements in newspapers was precisely one of the evils the Act was designed to correct. *See* Hearings on S. 1358, S. 2114 and S. 2280 before the Subcommittee on Housing and Urban Affairs, Senate Committee on Banking and Currency, 90th Cong. 1st Sess. at 386, 388 (1967). (George Meany's testimony, complaining of discriminatory housing advertisements in newspapers.)

We therefore agree with the District Court that the congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium.

B. *The Constitution Does Not Prohibit the Application of § 3604(c) to Newspapers*

Hunter next asks us to overturn § 3604(c) as violative of the First and Fifth Amendments of the United States Constitution.

1. *Freedom of the Press*

Noting that § 3604(c) limits advertising an intent to discriminate in the sale or rental of a dwelling only in a

---

[4] Title VIII was added by the Senate as an amendment to H.R. 2516, the civil rights bill passed by the House. The Senate amendment was a revision of S. 1358, an earlier fair housing bill on which hearings had been held in 1967. *See* Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong. 1st Sess. (1967). Since the Committee took no action on S. 1538, the bill did not reach the floor and no explanatory reports were published. Because Title VIII was passed as an amendment on the Senate floor, other than the 1967 Senate Committee hearings, the legislative history of the title consists mainly of the limited debates on the floors of the respective houses of Congress. The genesis of Title VIII is traced in B. Schwartz, *Statutory History of the United States: Civil Rights*, 1629-1632 (1970); Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149 (1969).

commercial context and not in relation to the dissemination of ideas, the District Court held that the statute does not contravene the First Amendment, and hence that a court might constitutionally enjoin a newspaper's printing of classified advertisements which violate the Act.[5]

The court's conclusion is supported by an unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context.[6] It is now well settled that, while "freedom of communicating information and disseminating opinion" enjoys the fullest protection of the First Amendment, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942). *See Breard* v. *City of Alexandria*, 341 U.S. 622, 641-645 (1951); *New York State Broadcasters Ass'n, Inc.* v. *United States*, 414 F. 2d 990, 998-99 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Banzhaf* v. *FCC*, 405 F. 2d 1082, 1099-1103 (D.C. Cir. 1968), *cert. denied, sub. nom. Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 40 U.S.L.W. 2218 (D. D.C. Oct. 20, 1971), (Three-judge court), *aff'd, sub. nom. Capital Broadcasting Co.* v. *Acting Attorney General*, — U.S. —, (No. 71-891 3/27/72).

---

[5] Since the institution of the present suit, one other district court, in an unreported decision, has specifically upheld the constitutionality of § 3604(e) as applied to newspapers. Holmgren v. Little Village Community Reporter, No. 70-C-2236 (N.D. Ill. Jan. 14, 1971).

[6] Professor Emerson defines the "commercial sector" as "roughly" embracing "the production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic and similar matters." T. Emerson, *The System of Freedom of Expression* 414 (1970). *See also* Note, *Freedom of Expression in a Commercial Context*, 78 Harv L. Rev. 1191, 1192, 1194-95 (1965).

Relying on this difference, district courts have uniformly held that § 3604(e), banning blockbusting practices, does not contravene the First Amendment. *United States* v. *Mitchell*, 327 F. Supp. 476, 486 (N.D. Ga. 1971); *United States* v. *Bob Lawrence Realty Inc.*, 313 F. Supp. 870, 872 (N.D. Ga. 1970); *United States* v. *Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969).

The publisher's response to the cases distinguishing between commercial advertising and other forms of expression is that the distinction is "meaningless in the context of the newspaper publishing business" because the revenue newspapers derive from advertising makes possible the publication of the rest of the paper. But it has been held that a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951); *Associated Press* v. *United States*, 326 U.S. 1, 6-7 (1945). While it is true, as Hunter contends, that "a newspaper can be silenced as easily by cutting of its source of funds, as it can be by enjoining its publication," no such threat is raised by the Act's prohibition of racially discriminatory advertisements. Non-discriminatory advertisements are still permitted. Since the Act also bars private publication of discriminatory advertisements, an advertiser has no incentive to abandon his regular use of newspapers to publicize his offer to sell or rent. We therefore doubt that the Act will deprive a newspaper of any revenue. Thus, the statute before us, unlike the schemes overturned in *Grosjean* v. *American Press Co.*,[7] and *United Interchange, Inc.* v. *Harding*,[8] cited by Hunter,

---

[7] 297 U.S. 233 (1936).

[8] 154 Me. 128, 145 A.2d 94 (1958).

will not adversely affect the valid dissemination of opinion or information.[9]

Congressional regulation of commercial advertising is not barred by *Near* v. *Minnesota,* 283 U.S. 697 (1931), which condemned unlawful prior restraints on free speech. The Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions when the enjoined conduct or expression was not fully protected by the First Amendment. *Lorain Journal Co.* v. *United States, supra.* (unanimous opinion upholding injunction prohibiting publisher from accepting or rejecting commercial advertisements of others in violation of the antitrust laws.) *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439 (1911) (upholding injunction against union newspaper promoting boycott). *See also Head* v. *New Mexico Board of Examiners,* 374 U.S. 424, 432 n. 12 (1963) (injunction restraining newspaper from publishing optometrist's advertising affirmed against attack based on the due process clause). In concluding that an injunction under § 3604(c) would not violate the First Amendment, we have also considered Hunter's recital of possible economic damages to a publishing business operating under such a court order. We think his fears of economic consequences are overdrawn. Furthermore, as a matter of law, his argument is answered by the Supreme Court's unanimous affirmance of injunctive relief against a newspaper in *Lorain Journal Co.* v. *United States, supra.*

---

[9] Contrary to the contentions in Hunter's brief, nothing in the statute or the relief requested by the Attorney General prohibits a newspaper from publishing news accounts concerning racial discrimination in housing, or criticizing the Government's enforcement of the Fair Housing Title, or editorially advocating repeal of the Act. *Cf.* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 40 U.S.L.W. 2218 (D. D.C. Oct. 20, 1971), *aff'd, sub nom.* Capital Broadcasting Co. v. Acting Attorney General, — U.S. —, (No. 71-891 3/27/72). Only publication of advertisements which indicate a discriminatory preference for certain customers in seeking a buyer or a renter of a dwelling—a commercial transaction—is proscribed.

Finally, a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate § 3604(c). In contrast to "printer's ink" statutes which make false advertising a crime, and which either legislatively or judicially exempt newspapers, *see generally* Note, *Regulation of Advertising,* 56 Colum L. Rev. 1018 (1956), a publisher can readily determine from the face of an advertisement whether it is intended to express a discriminatory preference. However the language of the advertisement is couched, the purpose of an advertiser who wishes to publish an advertisement in violation of the Act is to communicate his intent to discriminate and a newspaper publisher can divine this intent as well as any of his readers.

Accordingly application of § 3604(c) to newspapers does not contravene freedom of the press protected by the First Amendment.

2. *Due Process*

Hunter also argues than banning a newspaper's publication of discriminatory housing advertisements violates a publisher's rights under the due process clause. He contends syllogistically that, since a private, single-family homeowner, and a "Mrs. Murphy" landlord are permitted by § 3603(b) to effectuate their discriminatory preferences by refusing to sell or rent certain dwellings to a particular racial, religious, or ethnic group,[10] they must also, either as

---

[10] Section 3603(b)(1) lists a number of circumstances by which a "single-family house sold or rented by an owner" will be exempted from the Act's prohibition of refusing to sell or rent a dwelling because of one's color, race, religion or national origin. Section 3603(b(2) exempts "Mrs. Murphy's" now renowned roominghouse, i.e., "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies "one of such living quarters as his residence."

It appears that the rooms in the "private white home" offered for rent in the advertisements published by *The Courier* qualify the owner for the Mrs. Muryhy exemption.

a constitutional right or as a matter of statutory construction, be entitled to communicate in commercial advertising their intent to so discriminate. Therefore, the argument goes, if those persons may communicate their discriminatory intent, it is a violation of equal protection of the laws, *cf. Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), or alternatively a deprivation of liberty or property without due process of law for Congress to deprive newspapers of the right to publish the same lawful communications.

We reject Hunter's conclusion because we cannot accept the premises upon which he rests his syllogism. While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, neither the Act nor the Constitution gives him a right to publicize his intent to so discriminate.

Clearly, there is no such statutory right. Section 3603(b) establishes an exemption only from the prohibitions set forth in § 3604(a) (b) and (d). The Act specifically states that subsection (c) of § 3604 shall apply to sellers or lessors of dwellings even though they are otherwise exempted by § 3603(b). The draftsmen of the Act could not have made more explicit their purpose to bar all discriminatory advertisements, even those printed or caused to be printed by persons who are permitted by § 3603(b) to discriminate in selling or renting. During the House debate on the Fair Housing Title, Representative Celler, a supporter of the bill, said:

> If one [otherwise exempted by § 3603(b)] advertised in a mass media communication like a newspaper using discriminatory material, then one would come within the purview of the fair housing title.

114 Cong. Rec. 6490 (March 14, 1968).

Nor is there any constitutional requirement that sellers or lessors of otherwise exempted dwellings be permitted to advertise their intent to discriminate. As established

above, the First Amendment is not violated by a regulation appertaining only to commercial activity such as the publication of an advertisement offering to sell or rent a dwelling. If the prohibition of discriminatory advertisements is to be struck down, it must be because it is violative of the due process clause. Regulation of commercial advertising has withstood due process attack when the end is legitimate and reasonably related to the means employed *E.g., Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 610 (1935) (upholding statute forbidding dentists from advertising prices.) *Capital Broadcasting Co. v. Mitchell, supra,* (sustaining a ban on cigarette commercials advertising on radio and television.)

The Fair Housing Title was designed to provide fair housing throughout the nation and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery. *United States v. Mintzes,* 304 F.Supp. 1305, 1312-13 (D. Md. 1969); *Brown v. State Realty Co.,* 304 F.Supp. 1236, 1240 (N.D. Ga. 1969). *See Jones v. Alfred Mayer Co.,* 392 U.S. 409, 439-440 (1968). In combating racial discrimination in housing, Congress is not limited to prohibiting only discriminatory refusals to sell or rent. Widespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aim of the Act: seeing large numbers of "white only" advertisements in one part of a city may deter non-whites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a non-discriminatory basis. Considerations of this nature are highlighted by the Fifth Circuit's model decree in *United States v. West Peachtree Tenth Corp.,* 437 F.2d 221, 229 (5th Cir. 1971). There the operators of an apartment complex were not only enjoined from violating § 3604(c), but also directed to include affirmative fair house statements in all advertising, both in the defendant's own pamphlets and brochures, and in newspapers published by others.

Thus Congress has acted within the bounds of its constitutional power in prohibiting all discriminatory advertising of any dwelling, notwithstanding that some dwellings are otherwise exempted from the Act. If an individual advertiser has no constitutional or statutory right to circulate a discriminatory housing advertisement, a newspaper can stand in no better position in printing that unlawful advertisement at the individual's request. *See Head* v. *New Mexico Board of Examiners,* 374 U.S. 424, 432 n.12 (1963). Hunter's finespun argument falls, then, because his syllogism is without a solid foundation.

Moreover, even if private homeowners and "Mrs. Murphy" landlords were constitutionally or statutorily excluded from § 3604(c)'s coverage—and they are not—neither due process nor equal protection is abridged by a statute forbidding newspapers from carrying discriminatory housing advertisements. *See Railway Express Agency Inc. v. New York,* 336 U.S. 106 (1949) (prohibition against vehicles advertising another company's goods held valid against due process and equal protection attack). Newspapers have a far more widespread coverage than privately circulated advertisements, magnifying the already mentioned deleterious effect discriminatory advertisements might have on the congressional purpose in the Fair Housing Title. In holding constitutional regulation of advertising in another context, the Supreme Court has said:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislative might think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that point has been reached here. (Citations omitted.)

Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) *See Capital Broadcasting Co. v. Mitchell, supra.* Even if the ban on discriminatory housing advertisements applied only to pubic media, we hold such a classification to be reasonable and within the discretion of Congress.

C. *Advertisements Stating that Apartments are in a "White Home" Indicate a Racial Preference, And Therefore are Prohibited by § 3604(c).*

To the ordinary reader the natural interpretation of the advertisements published in *The Courier* is that they indicate a racial preference in the acceptance of tenants.[11] Indeed, the indication of a racial limitation is precisely what the writer of the advertisements published in *The Courier* intended when he used the words "white home." He later explained his reason for including the phrase in his ad: "It's really a kindness to colored people. There's no use making them * * * come here when I'm not going to rent to them." Accordingly, the District Court correctly held that the two advertisements published by *The Courier* violated the Act.

Any other interpretation of the advertisements would severely undercut the objectives of the legislation. If an advertiser could use the phrase "white home" in substitution for a clearly proscribed "white only," the statute would be nullified for all practical purposes. We cannot condone an interpretation which would circumnavigate congressional intent in this remedial statute designed to eliminate the humiliation and social cost of racial discrimination. *See Nesmith v. Young Men's Christian Association of Raleigh,*

---

[11] The Secretary of Housing and Urban Development has promulgated Advertising Guildelines for Fair Housing, 37 F.R. 6700 (April 1, 1972), which explicitly provide not only that newspapers are subject to the Act, but also that a phrase like "white home" is presumed discriminatory.

397 F.2d 96, 100 (4th Cir. 1968); *Miller v. Amusement Enterprises,* 394 F.2d 342 (5th Cir. 1968).

For the reasons above state in sections A, B, and C of this part of the opinion, we affirm the District Court's grant of a declaratory judgment.

II

Although we uphold the District Court's judgment with respect to § 3604(c), we are constrained to comment on the approach taken by the court in determining whether to grant the Attorney General relief under the Act. This is a case of first impression and the District Court's methodology may hereafter be relied on by other litigants and judges in Civil Rights cases. We therefore undertake an examination of the Court's stated reasons for denying the requested injunctive relief, and an analysis of its decision nevertheless to grant a declaratory judgment. The parties pressed no error in these respects, yet to allow what we deem an erroneous view of the law to remain undisturbed would light a false beacon with the possibility of harmful consequences of a general public nature.

A. *The District Court's Approach*

The Attorney General is empowered by § 813 of the Civil Rights Act of 1968, 42 U.S.C. § 3613, to enforce the Fair Housing Title of the Act. That section provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, *or* that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a

complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter. (Our italics.) [12]

---

[12] Due to the origin of the Fair Housing Title, see note 4 *supra*, there appears no helpful legislative history concerning § 3613. The governmental enforcement provision apparently stirred no controversy and was adopted without clarifying remarks. The section was plainly modeled after the governmental enforcement provisions of the Civil Rights Act of 1964, most notably, the twin sections 206 and 707 (42 U.S.C. 2000a-5 and 2000e-6). These sections authorize suit by the Attorney General in public accomodations and equal employment cases if he has "reasonable cause to believe that a pattern or practice of resistance" exists. In addition, these sections provide that, if the Attorney General certifies that the case is also one of "general public importance," he may request the empaneling of a three-judge court. In drafting the enforcement section of Title VIII in 1968, Congress retained the "pattern or practice" language verbatim. It omitted the resort to a three-judge court and instead made the existence of a case "raising an issue of general public importance" an alternative basis for the Attorney General's action.

The reason for creating an alternate ground for suit is unexplained. The present language of § 3613 was first included in an amendment proposed by Senator Dirksen as a substitute for the original proposed amendment adding a fair housing title to H.R. 2516 *Compare* § 13 of the original proposed fair housing amendment, 114 Cong. Rec.. 2271 (Feb. 6, 1968), with § 213 of the Dirksen substitute amendment, 114 Cong. Rec. 4573 (Feb. 28, 1968). The change was viewed as an expansion of the Attorney General's power to enforce the Fair Housing Title. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 Washburn L.J. 149, 157 (1969).

The close similarity in the terms employed in § 3613 and §§ 2000a-5 and 2000e-6 accounts for our reliance on the legislative and judicial interpretation of the latter in our construction of the words in § 3613. *See United States* v. *West Peachtree Tenth Corp.*, 437 F. 2d 221, 227 (5th Cir. 1971).

In the District Court, the Attorney General argued that under either of the alternative grounds specified in § 3613, he was entitled to an injunction and "such additional relief as the interest of justice may require."

In construing § 3613, the judge noted that

> [B]efore granting relief, [a court] should determine that such a pattern or practice of resistance exists or that there has been such denial of rights as would justify the granting of the relief prayed.

324 F. Supp. at 530-31.

After hearing the evidence, the court denied the requested injunction because, in its stated view, the Government failed to prove either that a pattern or practice of resistance existed or that the case raised an issue of general public importance. It also grounded its refusal on equitable principles, namely that (1) an injunction was not necessary since it was satisfied that defendant would abide by the law as pronounced by the court in a declaratory judgment, and (2) the Attorney General had singled out *The Courier* for legal action but had not sued to enjoin identical continuing activities of larger nearby newspapers.

B. *Statutory Prerequisites for Relief*

The District Court correctly stated its obligation to give relief only when the Government established that either a pattern or practice of resistance or a case raising an issue of general public importance is present. Section 3613 does not grant the Attorney General unlimited authority. The language of the section shows that Congress did not wish the Attorney General to enforce private civil rights created by the Act unless a specific violation has a measurable *public* impact in that it is either one of a pattern or practice of resistance *or* a case raising an issue of general public importance. If *neither* prerequisite for relief existed, a district court would be required to refuse the relief

sought by the Attorney General. *See United States* v. *Bob Lawrence Realty, Inc.*, 327 F. Supp. 487 (N.D. Ga. 1971). *Cf. United States* v. *Gray*, 315 F. Supp. 13 (D.R.I. 1970).[13]

We find no fault with the District Court's determination that a pattern or practice of resistance was not shown in this case. The same phrase is also found in the Civil Rights Act of 1964.[14] The 1964 legislative history clearly shows that Congress intended a "pattern or practice" to be more than an isolated or accidental instance of conduct violative of the Act, but rather, as the term "resistance" connotes, an intentional, regular, or repeated violation of the right granted by the Act. *See United States* v. *Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971) (applying the 1964 legislative history in construing § 3613).

In the case now before us, *The Courier* published only two allegedly discriminatory advertisements. The first was published before the Act was called to the defendant's attention; the second, some six months later, was printed without his authorization due to an employee's failure to bring the content of the advertisement to Hunter's attention as he had previously directed. Hunter noticed the second advertisement only when the advertiser asked the paper to run this second ad for another week. Once informed, the defendant refused to allow the ad to run again. In light of these facts, the District Court determined that

---

[13] It has been uniformly held that the question whether pattern or practice of resistance or a case of general public importance has been shown is for the court to determine, even though the Attorney General has alleged that *he* has reasonable cause to believe that a requisite ground for relief is present. *See* United States v. Mitchell, 313 F. Supp. 299, 300 (N.D. Ga. 1970) (applying § 3613); Dobbins v. Local 212, 292 F. Supp. 413, 443 (S.D. Ohio 1968) applying § 2000e-6); United States v. Gray, 315 F. Supp. 13, 19-23 (D.R.I. 1970) (applying § 2000a-5). *See also* the remarks of Senator Humphrey, 110 Cong. Rec. 14270 (June 18, 1964).

[14] *See* note 12, *supra*.

Hunter's sporadic and unintentional violations did not constitute a "pattern or practice of resistance."

But we emphatically do not agree with the court's conclusion that the Government failed to establish the alternative basis upon which relief could be granted—a case raising "an issue of general public importance." In determining that no such case was established, the court pointed out that no one was known to have complained of the advertisement published by *The Courier* and that similar ads are regularly carried in the major newspapers in nearby Washington, D.C.

We deem the absence of individual complaints and the continuance of similar violations by others to be irrelevant in determining whether a case raises an issue of general public importance, particularly in light of the clear congressional meaning attaching to this provision in its legislative history. Although the term is not defined in either the 1968 Act or its legislative history, the 1964 Civil Rights Act uses the nearly identical term, "case of general public importance," in authorizing three-judge courts in §§ 206 and 707 and in empowering the Attorney General to intervene in private suits, § 902. In the legislative history of the 1964 Act, a case of general public importance was defined as one where:

> the points of law involved in it are of major significance or * * * the particular decision will constitute a precedent for a large number of establishments * * *.

110 Cong. Rec. 12713 (June 4, 1964) (Senator Humphrey, floor manager for the Bill). The draftsmen unquestionably meant to incorporate this definition into the 1968 Act when they used the term "raises an issue of general public importance." [15]

---

[15] Although Congress reworded the phrase "case of general public importance" so that suit may be instituted by the Attorney General if there is a denial of rights and "such denial raises an

In the case at bar, a decision would be a precedent of "major significance" in future application of § 3604(c) to all newspapers.[16] No previous case presented the issue of the constitutionality of that section as applied to newspapers, or whether a reference to a "white home" was violative of the statute. A firm precedent was needed, particularly if other newspapers were to be brought into compliance without costly litigation. The questions of the scope and constitutionality of § 3604(c) plainly raised a classic issue of general public importance, affording a necessary prerequisite for relief, independent of whether a pattern or practice of resistance was also shown to exist.[17] The District Court was clearly in error, then, in deciding that the case did not raise an issue of general public importance.

Correction of this error is essential to affirming the District Court's grant of a declaratory judgment. Although properly holding that relief is available only where a pattern or practice of resistance or a case raising an issue of

---

issue of general public importance," the slight variation in style does not deter us from turning for guidance to the legislative history of the 1964 language. Indeed, in both the House and Senate floor debate in 1968, the 1964 phraseology was used interchangeably with the 1968 variation. See 114 Cong. Rec. 4908 (March 2, 1968) (Senate debate); 114 Cong. Rec. 8651 (April 2, 1968); 114 Cong. Rec. 9561 (April 10, 1968) (House debate).

[16] The "nation's leading daily newspapers" are said to have taken interest in the suit against *The Courier*. Editorial, "A Free Press," *The Courier*, Thursday, July 16, 1970, p. 4.

[17] In contrast to the 1964 Act, a pattern or practice of resistance is not an indispensable prerequisite for relief. Relief may be based on a single (unintentional) violation of the Act when by that violation a group of persions are denied their statutory rights and the case raises an issue of general public importance. Here the rights of all non-whites looking for an apartment were abridged by the illegal advertisements published in *The Courier*.

general public importance is proved, the District Court granted the Government a favorable declaratory judgment, notwithstanding its double determination that neither prerequisite for relief was established in the instant case. Since a declaratory judgment, no less than an injunction, is a form of relief under the Act,[18] it may be issued only after one or the other prerequisite for relief has been shown to exist. Thus, it would be illogical to grant a declaratory judgment in the Government's favor, while denying it an injunction for failure to establish a basis for relief. But, since we hold that this case raises an issue of general public importance, there appears a solid framework for granting relief under the Act. The appropriate form of that relief is the next topic for discussion.

C. *The Choice of Appropriate Relief*

As in all cases, upon determining that the minimum prerequisite for relief is present, the judge must choose from the spectrum of available remedies, that which is suitable, F.R.C.P. Rule 54(c).

In the course of the trial, the District Court commented that it might not grant an injunction on the evidence presented, but stated in substance that it would enter an order in the nature of a declaratory judgment fully determining the questions of law presented by both sides. The parties agreed to this procedure; defendant Hunter because he desired a final adjudication whether he was subject to the provisions of the Act, and the Attorney General because he required a resolution of the novel issues in a concrete case. Ultimately, the District Court did refuse the injunction and gave the Government a favorable declaration concerning the applicability of § 3604(c) to the case.

---

[18] *See* note 19, *infra*.

We find no abuse of discretion in denying the injunction and granting, in its place, declaratory relief to the Government.[19]

Established principles of equity dictate that in considering whether to grant injunctive relief a court should impose upon a defendant no restriction greater than necessary to protect the plaintiff from the injury of which he complains. *See* McClintock on Equity § 146 (2d ed. 1948). In the instant circumstances, the District Judge believed a declaration of the law would be as effective a remedy as the issu-

---

[19] Declaratory relief is among the possible remedies available to the District Court under § 3613. The section provides that the Attorney General may request:

> • • • such preventive relief, including an application for a permanent or temporary injunction, restraining order, *or other order* against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

It is difficult to imagine what the phrase "or other order" possibly encompasses if not declaratory relief. Declaratory judgments are no longer such curiosities that they would have to be specifically called by name.

Furthermore, in an appropriate case, a declaratory judgment may constitute a form of "preventive relief" mentioned in § 3613. Apparently, the Government also believes that declaratory relief in this case would effectively prevent further violations by Hunter because it did not appeal from the denial of the injunction. Furthermore, after the entry of a declaratory judgment, 28 U.S.C. § 2202 allows the application for additional relief (including coercive relief) based upon the declarations previously made. *See* Teas v. Twentieth Century-Fox Film Corp., 413 F.2d 1263, 1267 (5th Cir. 1969). Since the present declaratory judgment has determined the issue of *The Courier's* prior publication of illegal advertisements, it may also be used in case of Hunter's future violation to establish that the defendant engages in a pattern or practice of resistance.

Thus, a declaratory judgment, no less than an injunction, is a possible remedy under § 3613.

ance of an injunction because he was firmly convinced that the defendant, although opposing the Government's interpretation of § 3604(c), would obey the law as declared by the court.

Such a standard for refusing an injunction has been utilized by the Supreme Court. In affirming the denial of an injunction in an antitrust case, the Court said:

> Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations * * *. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation * * *. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

United States v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (citations omitted). *See also United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

This standard was also endorsed in *Bailey* v. *Patterson*, 206 F.Supp. 67, 70 (S.D. Miss. 1962), a civil rights case in which the district court granted the plaintiffs a favorable declaratory judgment, but denied the sought-after injunctive relief. The district court there declared that the Negro plaintiffs had a constitutional right to integrated interstate transportation facilities, but refused the injunction because it believed that the defendants would not thereafter violate plaintiff's rights. The Fifth Circuit reversed the trial judge's decision, 323 F.2d 201, 205-206 (5th Cir. 1963), but did so because the district court's finding that the defendants would not continue to discriminate was unsupported by the record. *See also United States* v. *Atkins*, 323 F.2d 733, 739-40 (5th Cir. 1963), where the district court's denial of requested injunctive relief was reversed as an abuse of

discretion because the Court of Appeals saw a "cognizable danger" of recurrence. We can find no similar error in the decision here under review, and agree with the District Court that Hunter is sufficiently unlikely to continue violating the Act as to make injunctive relief not warranted.[20]

We hasten to add, however, that our decision is in no way intended to deprecate injunctions as appropriate remedies in housing discrimination cases. Trial judges must remain vigilant to protect minorities from deprivation of their statutory and constitutional rights. An injunction should not be refused upon the mere *ipse dixit* of a defendant that, notwithstanding his past misconduct, he is now repentant and will hereafter abide by the law. Denial of an injunction is proper only in cases where, after hearing the defendant and examining the particular circumstances of the violations involved, including the existence of a pattern or practice of past violations, the judge is fully satisfied that the defendant will not continue his unlawful conduct. *See United States* v. *Oregon State Medical Society, supra; NAACP* v. *Thompson,* 357 F.2d 831, 838 (5th Cir.), *cert. denied, sub nom. Johnson* v. *NAACP,* 385 U.S. 820 (1966); *Bailey* v. *Patterson, supra.*[21]

We deal next with the District Court's second equitable ground for denying the requested injunction, namely that the Government failed to sue other newspapers in nearby

---

[20] We also note that in Bailey v. Patterson and United States v. Atkins, a pattern or practice of resistance was established and, in such a case, the likelihood of future resistance may be more substantial than where, as here, only sporadic violations were proved.

[21] Of course, an injunction may issue, even though the prior discrimination has ceased, and affirmative relief should be granted where the vestiges of prior discrimination linger and remain to be eliminated. United States v. Louisiana, 380 U.S. 154, 156 (1965); United States v. West Peachtree Tenth Corp., 437 F. 2d 221, 228 (5th Cir. 1971). In the instant case, no such effect was alleged to remain and none was found by the District Judge.

Washington, D.C., which print similar discriminatory advertisements, but chose to move against *The Courier* alone. The District Court invoked the equitable maxim that to obtain the benefit of equity, a plaintiff must himself do equity. We cannot agree that this maxim was appropriately invoked here as a basis for denying the injunction. Surely, the defendant cannot be heard to complain that the Attorney General, in discharging his executive responsibilities, has chosen to sue *The Courier* first and not, for example, *The Washington Post*. Such a choice is well within the prosecutor's discretion. *See, e.g., Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). If defendant's argument were generally accepted, the Government's enforcement effort would be crippled in such areas as antitrust, environmental protection, and labor, as well as civil rights. Indeed, § 3613 does not require the Attorney General to sue in *every* case where he has reasonable cause to believe that a pattern or practice of resistance or a case of general public importance exists, and for the court to question the Government's choice of a defendant would be an impermissible judicial interference with executive discretion. *Cf. United States* v. *Mitchell*, 313 F.Supp. 299, 300 (N.D. Ga. 1970); *United States* v. *Gray*, 315 F.Supp. 13, 22-24 (D.R.I. 1970).

Thus, were the official's choice of a defendant the only ground offered by the District Court for refusing the injunction, we would be compelled to reverse the decision as an abuse of discretion. But the Judge gave a valid alternative reason—the defendant's likely future compliance with the law—and upon that basis alone the denial of the injunction and the substitution of a declaratory judgment is a proper exercise of equitable discretion.

Summary

We have endeavored to outline for future cases the approach a trial judge should take in deciding whether to grant the Government relief in Fair Housing cases, and in determining whether injunctive or declaratory relief is appropriate. While the District Court in the instant case was not entirely correct in the reasons it gave for declining to issue an injunction and giving instead a declaratory judgment, the result ultimately reached was lawful and comported with the facts of the case.

As for the substance of the declaratory judgment, we are in accord with the court's holding that Congress intended § 3604(c) to apply to newspapers; that, so applied, the section is constitutional; and that the Act was violated by the advertisements published in *The Courier* stating that the apartment for rent was located in a "white home." The judgment is therefore *Affirmed.*

APPENDIX B

Filed: April 13, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 70-816-T

UNITED STATES OF AMERICA

v.

BILL R. HUNTER, d/b/a THE COURIER

Frank E. Schwelb and Robert J. Wiggers, Attorneys, Department of Justice, Washington, D.C., and George Beall, United States Attorney, Baltimore, Maryland, for plaintiff.

Arthur B. Hanson and W. Frank Stickle, Jr., Rockville, Maryland, and Ralph N. Albright, Jr., Washington, D.C., for defendant.

THOMSEN, District Judge

This is the first action brought by the Government against the publisher of a newspaper under the "Fair Housing" provisions of the Civil Rights Act of 1968, 42 U.S.C.A. 3601 et seq., to enjoin an alleged violation of subsection (c) of § 3604, which provides:

> " § 3604. *Discrimination in the sale or rental of housing*
>
> "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> " * * *
>
> "(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwell-

ing that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation or discrimination.

"* * * *"

The only exemption referred to by the parties, the so-called "Mrs. Murphy" exemption, contained in § 3603(b)(2), provides:

"(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

"* * *

"(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."

Under § 3613 the Attorney General may bring a civil action for an injunction and other appropriate relief whenever he has reasonable cause to believe either "that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter", or "that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance". The Attorney General is proceeding in this case under both alternatives. A court should not review the Attorney General's finding of reasonable cause, but before granting relief should determine that such a pattern or practice of resistance exists or that there has been such a denial of rights as would justify the granting of the relief prayed. *United States* v. *Mitchell,* 313 F.Supp. 299, 300 (N.D. Ga. 1970); *United States* v. *Building & Construction Trades Council,* 271 F.Supp. 447, 453 (E.D. Mo. 1966).

The Government's case is based upon two advertisements which appeared in defendant's newspaper, correspondence

before suit, and an editorial published after this suit was filed. There is little or no dispute about the facts.

Defendant contends: that § 3604(c) does not apply to newspapers disseminating real estate advertisements; that such application would violate the First Amnedment, and, in view of the "Mrs. Murphy" exemption, the Fifth Amendment; that the ads involved do not "indicate a preference in violation of § 3604(c)"; and that no pattern, practice, or denial of rights sufficient to justify the relief requested has been shown.

Findings of Fact

Defendant, Bill R. Hunter, a resident of Maryland, is publisher and editor of a weekly newspaper, The Courier, published in Prince George's County, Maryland, with a circulation of some 29,000 copies per week, mostly in that county. The Courier carries classified advertisements for the sale or rental of real estate. The advertisers supply the wording of the ads and pay the newspaper for their printing and publication. It is the policy of defendant to refuse to accept an ad if, in his judgment, it is either offensive or deceptive, or the advertiser is not acting in good faith and in good taste.

On January 8, 1970, The Courier carried the following advertisement:

> "FOR RENT—Furnished basement apartment. In private white home. Call JO 3-5493."

On January 26, 1970, Frank E. Schwelb, Chief, Housing Section, Civil Rights Division, Department of Justice, sent a letter to defendant, expressing the view that such ads violate the Fair Housing Act of 1968 because they indicate a racial preference, and suggesting that defendant instruct his employees to cease accepting such ads.

Defendant returned the letter with a note on the last page, stating:

> "The advertisement to which you refer does not specify that the apartment will be rented only to white occupants. It is the policy of this newspaper to accept no advertising which in any way is racially offensive, however, the statement that the home in which the apartment is located is occupied by white people should not in our opinion be offensive to anyone. We have given no further instructions to our employees.

On February 7, 1970, the Chief of the Housing Section again wrote defendant, setting forth in greater detail why the Civil Rights Division considers that such ads violate the statute.

On March 19, 1970, he sent defendant another letter, stating: "Since you have been unwilling to provide any assurance that you will discontinue the acceptance of advertisements which we believe to be in violation of the law, we shall have no alternative, should further advertisements of this kind appear, to recommend that suit be instituted in the appropriate Court to assure compliance with the Fair Housing Act."

Defendant received the second and third letters, but did not reply. He did, however, instruct his staff to refer any such ads to him before they were published. Due to the failure of an employee to follow that instruction, the following ad was published in The Courier on June 18, 1970, without defendant's having seen it:

> "FURNISHED APARTMENT, well located, clean, quiet. In white home. Gentlemen only. $17.50 a week. Call JO 3-5493."

Both ads were placed by an elderly, retired man named Crawford, who lived in southeast Washington.

This suit was filed on July 14, 1970. In its next issue The Courier carried a news article stating: "When questioned about his motive in indicating a white home in his ads, Crawford said, 'it's really a kindness to colored people. There's no use making them spend money to call here or come here when I'm not going to rent to them. I don't legally have to rent to anyone I don't want to'."

The same issue carried a long and not intemperate editorial, entitled "A Free Press", stating, inter alia: "We remain steadfast in our belief in the freedom of the press and the right of every homeowner to decide who shall or shall not live in the house with him."

The editorial also said: "The Courier has never, and will never, publish an advertisement or news item for the purpose of being racist, or in any way race baiting." That has in fact been the policy of the paper, which has published one or more editorials criticizing the actions of white racists.

The editorial also noted that "metropolitan daily newspapers have been publishing the same type ads for some time that the Justice Department is suing The Courier to discontinue." That is true. On the day after this suit was filed the Washington Post carried a story of the filing, and in the same edition carried six ads similar to those which appeared in The Courier, including the following:

> "CONN. AVE.—Wht. pvt. home. Apt. for employed, quiet lady, nonsmoker. Nr. Bus. 362-2275."
>
> "NE.—Nice rm., colored home. Refined, settled lady pref. 544-7724 aft. 6 p.m."
>
> "NE.—Lovely room in quiet colored home. Settled lady. 832-9063, aft. 6."

Four such advertisements were carried in the Washington Star and three or four in the Washington Daily News on

that date. Thereafter, similar ads have been carried by the Washington daily papers, some since this case was heard. Counsel for the Government told the Court that another Department has been negotiating with these large newspapers; but no action has been taken against them.

Discussion

I

On its face, § 3604(c) applies to *anyone* who makes, prints or publishes, or causes to be made, printed or published any notice, statement or advertisement with respect to the rental of a dwelling[1] indicating any of the preferences, limitations or discriminations listed in that section. There is no exemption for newspapers, although an exemption is provided for religious organizations and private clubs in other sections of the Act.

In *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577 (N.D. Cal. 1970), appeal pending, relied on by defendant, the Court was dealing with § 704(b) of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-3(b), which specifically states: "It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish" discriminatory advertisements relating to their own employment functions. Moreover, in *Brush*, the legislative history showed that the House Judiciary Committee Report stated: "The prohibitions of this section do not require newspapers and other publications to exercise any control or supervision over, or to do any screening of the advertisements or notices published by them". See 315 F.Supp. at 582.

The legislative history of the 1968 Act, involved in this case, contains no suggestion that newspapers are to be exempted. The only reference to newspapers was a state-

[1] Including a room or apartment in a dwelling, § 3602(b).

ment by Senator Ellender, an opponent of the bill, who said in the course of debate:

> "• • • Apparently, under this provision any newspaper publisher who accepted an advertisement indicating a preference by the owner of a certain race or religion would be in violation of the law. Apparently, freedom of speech and press guaranteed in the Bill of Rights is to be abolished with the inauguration of this open housing amendment." Cong. Rec., Sen., p. 3134, Feb. 15, 1968.

The Supreme Court said in *Arizona* v. *California*, 373 U.S. 546, 583, n. 85 (1963): "We recognize, of course, that statements of opponents of a bill may not be authoritative, see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951), but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms."

This Court concludes that § 3604(c) applies to newspapers.[2]

II

The restrictions in § 3604(d) limit speech only in a commercial context, not in relation to the dissemination of ideas. The Supreme Court and other courts have ruled that commercial activities are not entitled to the same First Amendment protections that are afforded to the expression of racial, religious or political views. See e.g., *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*,

---

[2] The Court has reached the foregoing determination without giving any substantial weight to a letter dated April 16, 1970, from Robert A. Sauer, Assistant General Counsel for Community Programs, United States Department of Housing and Urban Development, to Margaret Smith of the National Newspaper Association, offered by the Government. See *Zuber* v. *Allen*, 396 U.S. 168, 192-194 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Forbes* v. *Maddox*, 339 F. 2d 387 (9 Cir. 1964).

316 U.S. 52 (1942); *Jamison* v. *Texas*, 318 U.S. 413 (1943); *New York State Broadcasters Assn., Inc.* v. *United States*, 414 F.2d 990 (2 Cir. 1969), cert. denied 396 U.S. 1961 (1970); *Halsted* v. *Securities & Exchange Commission*, 182 F.2d 660, 668-669 (D.C. Cir. 1950). See also Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L.Rev. 1191 (1965).

In *United States* v. *Bob Lawrence Realty, Inc.*, 313 F. Supp. 870, 872 (N.D. Ga. 1970), dealing with another subsection of § 3604, Judge Edenfield said:

> "* * * It is evident that the statute does not make mere speech unlawful. What it does make unlawful is economic exploitation of racial bias and panic selling. We conclude that the statute is one regulating conduct, and that any inhibiting effect it may have upon speech is justified by the Government's interest in protecting its citizens from discriminatory housing practices and is not violative of the First Amendment." Id. at 872.

See also *Brown* v. *State Realty Co.*, 304 F.Supp. 1236 (N.D. Ga. 1969).

The Supreme Court has held that no prior restraints may be laid upon freedom of the press. *Near* v. *Minnesota*, 283 U.S. 697 (1931). In that case the state argued that the statute forbidding scandalous and defamatory newspapers was directed at the business of publishing such periodicals. In holding the statute unconstitutional under the First Amendment, the Supreme Court said:

> "* * * In determining the extent of the Constitutional protection [of a free press], it has been generally, if not universally, considered that it is the chief purpose of the guarantee to prevent previous restraints upon publication. * * *" 283 U.S. at 713.

In the present case, however, what is sought is injunctive relief against discriminatory advertising, not against publication of the newspaper or its editorial policy.

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936), also relied on by defendant, involved a tax solely on the advertising revenue of certain newspapers in Louisiana. The court struck down the tax because it was seen to be "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." 297 U.S. at 250. On the other hand, § 3604(c), as applied to newspapers, is an appropriate means to help eliminate housing discrimination.[3]

In a case where the facts justify it, an injunction against carrying the type of advertisements prohibited by § 3604 (c) does not constitute an unconstitutional previous restraint on freedom of the press.

III

Defendant contends "that because Congress granted to homeowners a 'Mrs. Murphy' exemption, under the Fifth Amendment it cannot deny to those homeowners a right to communicate their intention, nor can Congress, under the First and Fifth Amendments, subject newspapers to liability for publishing a real estate advertisement from an exempted homeowner."

The Fair Housing Act of 1968 does not attempt to prohibit an individual homeowner who comes within the provisions of § 3603(b)(2), such as the advertiser in this case, from refusing to rent a room or an apartment in his home

---

[3] It is not "on artificial licensing device" with oppressive and disproportionate requirements unrelated to the defendant's business, by which his publication "can be curtailed or terminated". See *United Interchange, Inc.* v. *Harding*, 154 Me. 128, 145 A. 2d 94, 99 (1958).

to a person who is distasteful to him for any reason. It is not necessary, therefore, to discuss the constitutional right of such an individual to refuse to rent a room or an apartment in his home to any applicant. See discussion in 82 Harv. L. Rev. 1294, at 1312 et seq. See also *United States* v. *Mintzes*, 304 F.Supp. 1305, at 1312-1313 (D.Md. 1969).

The Act does, however prohibit both the homeowner and anyone else from making printing or publishing or causing to be made printed or published any notice statement or advertisement with respect to the rental of a room or apartment, even in a private home, which "indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination." See § 3603(b)(2) and § 3604(c), quoted above.

The Government has not joined the advertiser as a party in this case, but in connection with the point raised by the publisher herein, it is necessary to consider whether the advertiser would have a constitutional right to cause to be made, printed or published any notice, statement or advertisement which indicated a prohibited preference or intention.

The fact that the statute does not attempt to prohibit a homeowner such as the advertiser in this case from refusing to rent a room or an apartment in his own home to any person for any reason, does not require the conclusion that Congress may not constitutionally prohibit such a homeowner from publishing or causing to be printed or published any notice, statement or advertisement which indicates a preference or intention to discriminate. Whether the homeowner should be denied the right to intimate his preference or limitation in an advertisement is a matter for the Congress, not the Courts.

IV

The two ads indicate a preference for a white tenant, and were intended to do so.

V

The meaning of the term "pattern or practice" was discussed at length in *United States* v. *Mintzes,* supra, 304 F.Supp. at 1313-1315, and in *United States* v. *West Peachtree Tenth Corporation,* — F.2d — (5 Cir. 1971). Those discussions need not be repeated here. The number of incidents necessary to show a pattern or practice depends upon the nature of the right protected and the nature of the ordinary violations of that right. The pattern or practice requirement means that the proven discriminatory conduct was not merely an isolated instance of racial discrimination, but that it was an event which happened in the regular procedures followed by the defendant and/or his employees.

In this case defendant published only two advertisements. The first was published before the statute was called to his attention. His first reaction was to question the interpretation of the Department of Justice, but when the Department reiterated its position, defendant told his employees to bring any such ads to his attention. The second ad was published without defendant's approval, not intentionally or deliberately by him, but as a result of the failure of an employee to bring the ad to his attention. Defendant is not a racist and does not advocate or wish to countenance racial discrimination. He indicated on the stand that he disagrees with the Department's interpretation of the law, but that he would consider the wording of each ad presented to him. The Government has not proved such a pattern or practice as would justify an injunction in this case.

The alternative justification for relief is for the Government to show "that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance". No black

person is shown to have complained of either of the two ads which form the basis of this case. The ads in the Washington daily papers show that similar ads are customarily published both by white and "colored" homeowners.[4] The Government did not prove that anyone has been actually offended or caused any inconvenience by the two ads involved in this case.

The Court has found that the ads violated § 3604(c) and that the application of that subsection to such advertisements does not deprive defendant of any of his constitutional rights. But every violation of § 3604(c) does not raise an issue of such general public importance as to justify an injunction, where no pattern or practice has been shown, and where the court is satisfied that the defendant will obey the law as declared.

There is a clearer reason, however, for denying the requested injunction in this case. It has been shown that the large Washington daily newspapers have been carrying similar advertisements both before and after the filing of this suit against the publisher of a county newspaper with

---

[4] The alternative methods of enforcement should be considered. Section 3610 provides that a person who claims to have been injured by a discriminatory housing practice, or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur, may file a complaint with the Secretary of Housing and Urban Development, who shall attempt to correct the alleged discriminatory housing practice by informal methods of conference, conciliation and persuasion. If the Secretary is unable to obtain voluntary compliance within a specified period, the party aggrieved may within 30 days thereafter "commence a civil action in any appropriate United States district court, against the respondent named in the complaint to enforce the rights granted or protected by this subchapter," subject to certain provisos. Section 3612 provides for the enforcement of the rights granted by §§ 3603-3606 by private civil actions. The remedies provided by § 3610 and § 3612 will be effective in certain types of cases.

a small circulation. The Government has an obligation to treat citizens fairly and equally and to do equity when it seeks equitable relief.

Counsel should agree upon an appropriate judgment giving effect to the rulings in this opinion.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 70-816-T

UNITED STATES OF AMERICA

v.

BILL R. HUNTER, d/b/a THE COURIER

Judgment

This matter having come before the Court upon the complaint filed herein by the plaintiff and the answer thereto filed by the defendant, the Court having read and considered the pleadings and the memoranda of law filed by both parties, and the Court having heard testimony in open court and oral argument by counsel for the respective parties; now, therefore, in view of the foregoing, and in accordance with the opinion filed herein on April 13, 1971, it is, this 14th day of May, 1971,

ORDERED, ADJUDGED, DECLARED AND DECREED as follows:

1. The use of the terms "private white home" and "in a white home", as those terms were used in classified real estate advertisements appearing in defendant's newspaper, indicated a preference in violation of Section 804(c) of the Civil Rights Act of 1968;

2. Section 804(c) of the Civil Rights Act of 1968 applies to anyone who makes, prints or publishes, or causes to be made, printed or published, any notice, statement or advertisement with regard to the rental of a dwelling indicating any of the preferences, limitations or discriminations listed in that Section, and there is no exemption for newspapers or newspaper publishers;

3. In its application to newspapers or newspaper publishers, as set forth in paragraph 2 above, Section 804(c) of the Civil Rights Act of 1968 does not constitute an unconstitutional previous restraint on freedom of the press; and

4. For the reasons stated in the opinion filed herein on April 13, 1971, the plaintiff is not entitled to the injunctive relief requested in the complaint, and such relief is hereby denied.

United States District Judge

copies to—

Frank E. Schwelb, Esq.
Robert J. Wiggers, Esq.
Civil Rights Division
Department of Justice
Washington, D.C. 20530

George Beall, Esq.
United States Attorney
409 Post Office Building
Baltimore, Maryland 21202

Arthur B. Hanson, Esq.
W. Frank Stickle, Jr., Esq.
22 W. Jefferson Street
Rockville, Maryland

Ralph N. Albright, Jr., Esq.
888 17th Street, N.W.
Washington, D.C. 20006

APPENDIX D

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ASSISTANT SECRETARY FOR EQUAL OPPORTUNITY

[Docket No. R-72-108]

37 F.R. 6700 (April 1, 1972)

ADVERTISING GUIDELINES FOR FAIR HOUSING

Notice of Statement of Policy

In order to facilitate and promote compliance with the requirements of Title VIII of the Civil Rights Act of 1968, and particularly section 804(c) thereof (42 U.S.C. 3601, 3604(c)) regarding notices, statements or advertisements, the Department of Housing and Urban Development has prepared guidelines to indicate graphic and written references that are appropriate for the preparation, publication, and general use of advertising matter with respect to the sale or rental of a dwelling as defined by the Act.

Notice of a proposed statement of policy was published in the FEDERAL REGISTER on May 21, 1971 (36 F.R. 9266). Comments were received from 26 interested persons and organizations and consideration has been given to each comment.

Several comments observed that the proposed policy statement was at times unnecessarily limited to the field of newspaper advertising. In response to the comments, the policy statement has been revised in several places to clarify that the guidelines apply to advertisements in all media, including, e.g., television and radio, as well as to advertising agencies and other persons who use advertising.

Several organizations suggested additional catchwords connoting a discriminatory effect for inclusion in section A-3. That section has been expanded to include several ad-

ditional terms which may have a discriminatory effect when used in a discriminatory context.

In response to other comments, section A-6 has been revised to clarify how directional references could be employed in a discriminatory context with an ethnically, as well as a racially, discriminatory effect. Also, section A-7 has been added relating specifically to designation of religious, ethnic or racial facilities to identify an area or neighborhood.

A number of comments indicated that human models or Equal Opportunity advertisements can and have been used selectively to promote the development of racially exclusive communities. A new section C-4 has been added in order to meet this specific problem. The previous human models section has been clarified by revision and reorganization in the new section C, in light of comments which indicated confusion or uncertainty surrounding the use of human models.

In response to publisher's comments, Table I has been simplified and references to minimum type sizes limited to a recommendation that the type should be bold display face and no smaller than eight points.

A number of organizations suggested the inclusion of a publisher's notice to appear with real estate advertising. A suggested notice has been included as Table III, in lieu of the provision in the proposed guidelines for direct notification to all firms or persons using the advertising services of a publisher. This provision was removed in light of objections that such notification would be unworkable or would impose great hardship since a large volume of real estate advertising is placed by a great number of persons on a nonrecurring basis.

Finally, a number of minor editorial or organizational changes have been made in order to clarify or simplify the advertising guidelines.

Several organizations suggested that the guidelines make specific reference to the roles of other enforcement agencies, including the Department of Justice and local agencies. These comments suggested that the guidelines specify that they do not alter or affect conciliation agreements or court orders obtained by these agencies, as well as by the Department. Such a disclaimer appears to be unnecessary, since there is nothing in the guidelines to indicate an intent to alter or affect agreements or orders obtained by the Department and other agencies.

This document is issued pursuant to section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

The statement of Policy reads as follows:

Publication Guidelines for Compliance With Title VIII of the Civil Rights Act of 1968

POLICY STATEMENT

Section 804(c) of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3604(c), makes it unlawful to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling (any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereof of any such building, structure, or portion thereof) that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation or discrimination.

These advertising guidelines are being issued for the purpose of assisting all advertising media, advertising agencies, and all other persons who use advertising to make, print, or publish or cause to be made, printed, or published any classified or display advertisement with respect to the

sale or rental of a dwelling by the owner or his agent, in compliance with the requirements of title VIII.

Conformance with these guidelines will be considered in evaluating compliance with title VIII in connection with investigations by the Assistant Secretary of advertising practices and policies under the title.

A. *The use of words, phrases, sentences and visual aids which have a discriminatory effect.* The following words, phrases, symbols, and forms typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory intent. Their use should therefore be avoided in order to eliminate their discriminatory effect. In considering a complaint under title VIII, the Assistant Secretary will normally consider the use of these and comparable words, phrases, symbols, and forms to indicate possible violation of the title and to establish a need for seeking resolution of the complaint, if it is apparent from the context of the usage that discrimination within the meaning of the Title is likely to result.

1. *Words descriptive of dwelling, landlord, and tenant.* White private home, Colored home, Jewish home.

2. *Words indicative of race, color, religion, or national origin.* Negro, Hispano, Mexican, Indian, Oriental, Black, White, WASP, Hebrew, Irish, Italian, European, etc.

3. *Catch words.* Restricted, ghetto, disadvantaged. Also, words such as private, integrated, traditional, "board approval" or "membership approved" if used in a discriminatory context.

4. *Symbols or logotypes.* Symbols or logotypes which imply or suggest race, color, religion, or national origin.

5. *Colloquialisms.* Locally accepted words or phrases which imply or suggest race; color, religion, or national origin.

6. *Directions to the real estate for sale or rent (use of maps or written instructions).* References to real estate locaiton made in terms of racially or ethnically significant landmarks such as an existing Black development (signal to Blacks) or an existing development known for its exclusion of minorities (signal to Whites). Specific directions given from a racially or ethnically significant area.

7. *Area (location) description.* Use of religious, ethnic, or racial facilities to describe an area, neighborhood, or location.

B. *Selective use of advertising media or content with discriminatory effect.* The selective use of advertising in various media and with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of title VIII.

1. *Selective geographic impact.* Such selective use may involve the strategic placement of billboards, brochure advertisements distributed within a limited geographic area by hand or in the mail, or advertising in particular geographic coverage editions of major metropolitan newspapers, or in local newspapers which are mainly advertising vehicles for reaching a particular segment of the community, or in displays or announcements only in selected sales offices.

2. *Selective use of equal opportunity slogan or logo.* Such selective use may involve using the equal opportunity slogan or logo in advertising reaching some geographic areas, but not others, or with respect to some properties but not others.

3. *Selective use of human models.* Such selective advertising may also involve the use of human models primarily in media that cater to one racial or ethnic segment of the population that is not balanced by a complementary advertising campaign that is directed at other groups, or the use

by a developer of racially mixed models to advertise one of the developments and not others.

C. *Policy and practices guidelines.* The following guidelines are offered as suggested methods of assuring equal opportunity in real estate advertising:

1. *Guidelines for use of logotype, statement, or slogan.* All advertising of residential real estate for sale or rent can contain an Equal Housing Opportunity logotype, statement or slogan as a means of educating the homeseeking public that the property is available to all persons regardless of race, color, religion, or national origin. Table 1 (see appendix) indicates suggested sizes for the use of the logotype. In all space advertising which is less than 4 column inches of a page in size, the Equal Housing Opportunity slogan should be used. The advertisement may be grouped with other advertisements under a caption which states that the housing is available to all without regard to race, color, religion, or national origin. Alternatively, 3-5 percent of the advertisement copy may be devoted to a statement of the equal housing opportunity policy of the owner or agent. Table 2 (see appendix) contains copies of the suggested Equal Housing Opportunity logotype, statement and slogan.

2. *Guidelines for use of human models.* Human models in photographs, drawings, or other graphic techniques may be used to indicate racial inclusiveness. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing both majority and minority groups in the metropolitan area. Models, if used, should indicate to the general public that the housing is open to all without regard to race, color, religion, or national origin, and is not for the exclusive use of one such group.

3. *Guidelines for notification of Fair Housing Policy.* (a) *Employees.* All publishers of advertisements, advertising agencies, and firms engaged in the sale or rental of real

estate should provide a printed copy of their nondiscriminatory policy to each employee and officer.

(b) *Clients.* All publishers of advertisements and advertising agencies should post a copy of their nondiscrimination policy in a conspicuous place wherever persons come to place advertising and should have copies available for all firms and persons using their advertising services.

(c) *Publisher's notice.* All publishers are encouraged to publish at the beginning of the real estate advertising section a notice such as that appearing in Table 3 (see appendix).

Effective date. This statement of policy shall be effective May 1, 1972.

SAMUEL J. SIMMONS,
Assistant Secretary
for Equal Opportunity.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-146

BILL R. HUNTER, d/b/a THE COURIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner published two advertisements announcing the availability of an apartment "in a white home" and "in private white home." When petitioner refused to agree to discontinue publication of such advertisements, the United States brought suit pursuant to 42 U.S.C. 3613. The district court issued a declaratory judgment holding that the advertisements indicated a racial preference in violation of Title VIII of the Civil Rights Act of 1968, specifically of 42 U.S.C. 3604(c).[1] The defendant appealed, and on April 27, 1972, the court of appeals affirmed (459 F. 2d 205). A timely petition for a writ of certiorari was filed on July 25, 1972.

[1] The text of the statute is set forth at page 3 of the petition.

476-136—72

Petitioner claims that Section 3604(c) does not apply to newspapers, and that to so apply it violates the First and Fifth Amendments. He also claims the advertisements did not indicate any racial preference in violation of Section 3604(c). These arguments were unanimously rejected by the courts below, in accord with well-established precedents. Further review by this Court is not warranted.

1. Petitioner contends that the courts below "failed to recognize that by its terms, Title VIII covers only dwelling owners, brokers, and lending institutions" (Pet. 8). But 42 U.S.C. 3604(c) makes it unlawful to make, print or publish, or cause to be made, printed or published, all discriminatory advertisements, and in no way restricts the class of persons to whom the prohibition applies. Unlike other Sections of the Act,[2] Section 3604(c) does not provide any specific exemptions or designate the persons covered, but rather, as the courts below noted, applies to *anyone* who engages in the prohibited conduct. Moreover, even if there were ambiguity in the statutory language (and we agree with the courts below that there is none), the legislative history cited by the court of appeals (Pet. App. 4a–5a) shows that the Act was designed to pro-

[2] *E.g.*, 42 U.S.C. 3603(b), 3605, and 3607. In *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal.) (appeal pending No. 26,666, C.A. 9), relied on by petitioner, the prohibition against discriminatory employment advertising applied to employers, unions, and employment agencies, and the court held that a newspaper is not an employment agency.

hibit, among other things, publication of discriminatory newspaper advertising.[3]

2. Petitioner contends that the decisions below deny him freedom of expression protected by the First Amendment. As noted by the courts below, however, it is clearly established that while the communication of information and the dissemination of opinion are broadly protected by the First Amendment, purely commercial advertising is not. *Valentine* v. *Chrestensen*, 316 U.S. 52.[4]

3. 42 U.S.C. 3604(c) prohibits discriminatory advertising with respect to all dwellings, whether or not their rental policies are reached by the Act. Petitioner perceives a "due process" violation in the failure of Congress to exempt from the advertising proscriptions of Section 3604(c) the "Mrs. Murphy" type of dwelling, which is exempt from the prohibition against discrimination in rentals. 42 U.S.C. 3603 (b)(2). But cf. *Jones* v. *Mayer Co.*, 392 U.S. 409. As observed by the court below, however, Congress might reasonably believe that the widespread appearance of discriminatory advertisements in the media would promote segregation in housing by deterring nonwhites from seeking housing in white areas. This judgment being rational, the statute does not violate

[3] The Advertising Guidelines for Fair Housing recently promulgated by the Secretary of Housing and Urban Development, 37 Fed. Reg. 6700 (April 1, 1972), which are entitled to great weight, *Udall* v. *Tallman*, 380 U.S. 1, 16, provide that newspapers are subject to the Act and that phrases like "white home" are presumptively discriminatory.

[4] And see additional authorities collected in the opinion below (Pet. App. 6a–7a).

the Fifth Amendment. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

4. The discriminatory character of the advertisements in question here is apparent on their face. To run afoul of the statute, an advertisement need not certify a racial exclusion; it is unlawful if it indicates a racial preference. The ordinary reader could hardly fail to conclude that the phrase "white home" indicates a preference for white tenants, the district court so found, and the writer of the advertisements himself described them as " 'really a kindness to colored people. There's no use making them * * * come here when I'm not going to rent to them ' " (Pet. App. 13a). To hold that "white home" is beyond the reach of the Act while "white only" is covered would so exalt form over substance as to nullify the statute. The court of appeals properly declined to do so (Pet. App. 13a–14a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
DAVID L. NORMAN,
Assistant Attorney General.
FRANK E. SCHWELB,
ROBERT J. WIGGERS,
Attorneys.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

FILE COPY

Supreme Court, U. S.
FILED
DEC 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-146

BILL R. HUNTER, d/b/a The Courier, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
RALPH N. ALBRIGHT, JR.

888 17th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-146

BILL R. HUNTER, d/b/a The Courier, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

Comes now the Petitioner, Bill R. Hunter d/b/a The Courier, pursuant to Rule 58(1) and respectfully moves this Honorable Court for leave to file this petition for rehearing and, further pursuant to Rule 58(2), respectfully petitions this Court for a rehearing of its order dated October 16, 1972, denying the earlier petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and for his reasons therefore states as follows:

MOTION FOR LEAVE TO FILE THIS PETITION

1. The twenty-five day limitation set out in Rule 58 expired on November 10, 1972.

2. However, an intervening circumstance of substantial or controlling effect on the instant case occurred on December 4, 1972, when this Court granted the Petition of the Pittsburgh Press Company in No. 72-419 for a Writ of Certiorari to review the decision of the Supreme Court of Pennsylvania that, under a local ordinance, Pittsburgh newspapers are forbidden to classify employment advertising under gender-designated column headings.

3. Because the First and Fifth Amendment issues involved in No. 72-419 (*Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, et al.*) are similar, if not identical, to the issues involved in the instant case, a review of this Court's said October 16, 1972, order denying Certiorari herein appears appropriate and justified to your petitioner.

4. Accordingly, petitioner requests that his motion for leave to file the following petition for rehearing be granted.

PETITION FOR REHEARING

1. The instant case is one of first impression and involves the constitutional and statutory validity of applying to newspapers the real estate advertising proscription contained in section 804(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c). That section makes it unlawful to make, print, or cause to be made, printed, or published any discriminatory real estate advertisement. The Courts below concluded that its prohibitions extend to newspapers in publishing real estate advertisements in their classified pages. By the

determinations of the Circuit and District Courts, a newspaper publishes classified real estate advertising at its peril, and is forced to make almost instantaneous decisions in its day-to-day operations on thousands of real estate advertisements as to their discriminatory impact, or absence thereof. For this and other reasons set forth in his petition for a Writ of Certiorari, your petitioner believes that the First and Fifth Amendment rights raised by the circumstances of this case are of far-reaching national importance.

2. Fundamentally, the issues raised by this case are the same as those raised in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, et al.*, No. 72-419, in which Certiorari was granted on December 4, 1972. Both cases involve the editorial and commercial operation of a newspaper's classified advertising pages. Both cases involve governmental intrusion on a free and untrammeled press requiring newspapers to become enforcement arms of government agencies charged with policing social conduct. Both demonstrate that such enforcement schemes amount to a prior restraint on First Amendment freedoms. Further, both involve the practical, onerous difficulties caused by placing the burden on newspapers to police, at their peril, thousands of classified advertisements with only the vague outlines of the statute or ordinance as guides.

4. By granting this petition for a rehearing and by granting the petition for a Writ of Certiorari herein, it is respectfully suggested that the Court would create an excellent companion case to No. 72-419. Moreover, it would provide an additional vehicle to delineate the application of the First and Fifth Amendments to the life blood of the newspaper publishing business—

the publication, sale and distribution of advertising. That this commercial aspect of the newspaper publishing business is entitled to First Amendment protection is demonstrated by this Court's application of the First Amendment to the commercial activity of newspaper sales and distribution, as illustrated by *Grossjean* v. *American Press Co.*, 297 U.S. 233 (1936).

5. In accordance with Rule 58(2), the undersigned counsel hereby certify that this petition is presented in good faith and not for delay; and that the petition is restricted to only intervening circumstances of substantial or controlling effect as above specified.

CONCLUSION

For the foregoing reasons, this motion for leave and this petition for rehearing should be granted.

Respectfully submitted,

ARTHUR B. HANSON

W. FRANK STICKLE, JR.

RALPH N. ALBRIGHT, JR.

HANSON, O'BRIEN, BIRNEY, STICKLE and BUTLER

888 17th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 298-6161

Attorneys for Movant and Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–146

BILL R. HUNTER, D/B/A, THE COURIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On October 16, 1972, this Court denied a petition for a writ of certiorari in this case. The petitioner thereafter filed a petition for rehearing, and on January 8, 1973, this Court requested the United States to respond to the petition for rehearing. This memorandum is submitted in response to that request.

1. The petitioner predicates his request for rehearing on this Court's grant of certiorari on December 4, 1972, in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* No. 72–419. The rehearing petition states that the two constitutional issues raised by the petition in *Pittsburgh Press* are "similar, if

494–715—73

not identical" (Rehearing Pet. 2) to the constitutional questions raised in the certiorari petition in the present case,[1] and this, it is argued, warrants the granting of the petition.

2. One of petitioner's contentions is that, as applied to him, the absolute ban in Title VIII on racially discriminatory housing advertising,[2] when contrasted with the exemption from the Act's coverage for "live-in landlords" with five or fewer units, denies him due process in that he is prohibited from advertising something which it is not illegal to do (Pet. 12–13).[3]

In *Pittsburgh Press* the petition raises, *inter alia*, the question whether it was constitutionally proper to preclude the newspaper from maintaining separate sex-designated employment advertising columns in the absence of proof that employers placing help-wanted advertisements in such columns have, in fact, discriminated in their employment practices (see Petition in No. 72–419, at 3, 14.

In brief, the *Hunter* petition questions the constitutionality of the congressional determination to bar completely all discriminatory housing advertisements without making illegal in the same legislation (see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409) all discriminatory rental practices.[4] The *Pittsburgh Press* petition, on

[1] The certiorari petition here also raised two questions of statutory interpretation which apparently are not renewed in the petition for rehearing. See Petition in No. 72–146, Questions I and VI at pp. 2–3, and pp. 7–8 and 13–14.

[2] Section 804(c) of the Civil Rights Act of 1968, 42 U.S.C. 3604(c).

[3] But see *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409.

[4] See Memorandum for the United States in Opposition in this case, No. 72–146, at pp. 3–4.

the other hand, questions the quantum of proof necessary for the imposition of liability under an "aiding" provision of a local ordinance to be constitutional. Since the present case involves the violation of an explicit statutory prohibition of discriminatory advertising, rather than of an aiding or abetting statute, the due process issues in the two cases are significantly different, and the granting of the petition in *Pittsburgh Press* should not affect this Court's earlier disposition of that aspect of the petition in the present case.

3. However, the petitions in both cases question whether legislative power exists, consistent with the First Amendment, to regulate the publication in newspapers of discriminatory commercial advertising. The Court's decision in *Pittsburgh Press* would ordinarily be rendered this Term; whereas, if certiorari were now granted in the present case, it would not under normal scheduling be argued until next Term. Accordingly, should the Court wish to reconsider in *Pittsburgh Press* the impact of the First Amendment on purely commercial advertising,[5] it may wish to postpone disposition of the present petition for rehearing pending its decision in *Pittsburgh Press*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

---

[5] See *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000, affirming 333 F. Supp. 582 (D. D.C.), and authorities collected in the opinion below, Pet. App. 6a–7a.

U.S. GOVERNMENT PRINTING OFFICE: 1973